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No. 84-1431

In The
Supreme Court of the United States
October Term, 1984

GLORIA R. SMITH,
Petitioner,

v.

RONALD E. SORENSEN, Commissioner of Labor, Department of Labor, State of Nebraska; WILLIAM R. LODER, Director, Comprehensive Employment and Training Unit, Department of Labor, State of Nebraska; DEPARTMENT OF LABOR, State of Nebraska; DIRECTOR OF THE MERIT SYSTEM OF THE STATE OF NEBRASKA; and STATE OF NEBRASKA,
Respondents.

RICHARD GETTEMY and DONNA POLK,
Petitioners,

v.

RONALD E. SORENSEN, et al.,
Respondents.

JAMES L. BAUDLER,
Petitioner,

v.

RONALD E. SORENSEN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

Although Respondents could not agree with several assertions made by Petitioners in their "Statement of Facts," particular exception would be taken to certain of their comments. First, Respondents would disagree with the claim that the May 22, 1974, letter from the Merit System Director to the Personnel Officer of the Division of Employment of the Department of Labor "is not clear" and "is contradictory." (Petitioners' Brief, p.3). The letter has been included in the Appendix at App. 1 so that it can be seen that it clearly indicates that the Merit System Director interpreted the rules of his agency to provide retention points only for service within the particular member agency in which the affected employee worked, unlike the system allowing transfer of continuous service time which is used for the purpose of calculating sick leave, annual leave, and retirement benefits.

Second, the Petitioners gave an inaccurate portrayal of the District Court's holding. The Petitioners claimed that, "[t]he District Court found that these representations made by the agency head were sufficient to create a reasonable expectation on the part of the employees and thus a property interest and seniority rights earned prior to transfer to CETA." Upon reading the portions of the District Court's opinion appearing at pages 41a-43a in the Appendix of Petitioners' Brief, it becomes apparent that the District Court was reluctant to rely solely upon representations allegedly made to Petitioners several years previously. The Court mentioned the possibility that any reference to seniority was in the context of sick leave, vacation, and salary. Instead of resting on

alleged representations by superiors, the Lower Court's decision to acknowledge a property interest in pre-CETA employment was based upon the Court's interpretation of the Merit System Rules and was merely "bolstered" by representations from superiors that the employees would not lose seniority (Petitioners' Brief, Appendix, pp. 56a-57a).

Respondents also object to the inclusion in the Petitioners' "Statement of Facts" the assertion that "[t]he Circuit Court reversed on the basis that the representations of the Commissioner of Labor to the Plaintiffs were unauthorized under *federal* law; that *federal* standards of construction of the employment contracts should be applied rather than state standards." (Petitioners' Brief, p.6). That is a misstatement of the basis for the Circuit Court's reversal. The Circuit Court expressly stated that it was relying upon state law to determine the extent of the employees' property interests (Petitioners' Brief, Appendix, p.7a). Also, as has been noted, the misinterpretation of the Merit System Rules by the District Court was only one of the reasons for reversal.

Such other facts as may be necessary to the presentation of this matter will be set forth in the Argument.

SUMMARY OF ARGUMENT

It would be improvident to grant a Writ of Certiorari in these cases because of the likelihood that the cases are moot and because a ruling favorable to Petitioners on the

question presented would not affect the outcome of the case.

Furthermore, contrary to Petitioners' assertions, the Circuit Court used state, rather than federal, law to determine the scope and sufficiency of the employees' property rights in their state employment. The decision of the Eighth Circuit was consistent with decisions of this Court and the Constitution.

———o———

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

The essence of Petitioners' arguments is that the Circuit Court erred in failing to apply Nebraska law in determining the Petitioners' property rights in their state employment. In compliance with the dictates of *Board of License Commissioners of the Town of Tiverton v. Pastore,* 469 U.S. —, 83 L.Ed.2d 618, 105 S.Ct. 685 (1985), we would first point out that the matter may be moot.

The employees filed their lawsuits against the Respondents in late 1981 following the announcement of a reduction in force, or RIF, within the CETA Division within the Nebraska Department of Labor. The RIF was to be carried out according to the steps outlined in a July 9, 1981, guideline which had been distributed to CETA Division employees. Although the guideline had been designed as a restatement of the Nebraska Merit System Rules for application to that particular situation, the Petitioners filed lawsuits in Federal Court pursuant to 42 U.S.C. § 1983, alleging that the guidelines improperly lim-

ited the calculation of their "retention points" to only CETA employment and improperly limited their "bumping rights" to positions within CETA. Upon the filing of each of their respective complaints, the United States District Court enjoined the Respondents from terminating the Petitioners' employment; these injunctions remained in effect during the duration of the lawsuit. Trial was held in July, 1982; and on June 17, 1983, the Court entered its judgment in Petitioners' favor.

On or about September 30, 1983, as a result of the cessation of federal funding under the Comprehensive Employment and Training Act, the CETA Division of the Nebraska Department of Labor went out of existence. New divisions, the Division of Job Training and the Greater Nebraska Job Training Program, were created and funded through the federal Job Training Partnership Act. CETA Division employees were given a preference in the hiring process for the new divisions, and all the Petitioners obtained positions within those divisions.

On January 1, 1984, the Nebraska Merit System was merged into the Department of Personnel, creating a single personnel system. The new personnel rules, adopted after notice and public hearing, did not refer to "retention points." Instead, the rules gave the agency head authority to devise a layoff plan specifying the basis for the exercise of bumping rights. The agency head was required to consider quality of service, length of service, any job-related factor, any affirmative action consideration, or combination of the above (Chapter 15, Section 002, Department of Personnel Rules, 1/1/84; Appendix, App. 2).

The Department of Labor then devised a layoff plan which was distributed to staff in September, 1984. Among other details, the procedure sets up a retention points calculation which provides for length of service credits and performance credits. These credits are calculated upon the employee's entire time of service within the Department of Labor. Bumping rights may be exercised to other positions in the same class, lower positions in the same class series, to a class of a position formerly held or lower positions in the same class series. Bumping rights may be exercised on a state-wide basis within the Department of Labor, according to the layoff plan.

In light of the foregoing series of events, it would appear that there is no need for further action in connection with the case. The Merit System agency in which Petitioners were employed at the time the layoff was instituted is no longer in existence. Neither are the rules on which they base their claim to property rights. Whether replacing the Merit System Rules by the State Personnel System Rules constituted an unlawful deprivation is a question for another lawsuit—not this one. Furthermore, the layoff plan presently in effect within the Department of Labor grants the Petitioners essentially all of the benefits to which they claimed they were entitled, with the possible exception of the right to bump across department lines. Neither the U.S. District Court or the Eighth Circuit Court of Appeals indicated their bumping rights were this broad. Therefore, it would seem that the matter is now moot. *Preiser v. Newkirk,* 422 U.S. 395 (1975).

It might also be noted that the issue which the Petitioners believe warrant Supreme Court review, regardless of how resolved, would not affect the ultimate decision. The issue which is said to warrant the granting of a writ of certiorari involves the determination of Petitioners' property or contract rights. Even if the Petitioners are correct in what they say, the outcome will not be different since the Circuit Court also found that whatever rights the Petitioners had were not taken without due process. Even if the Petitioners had the property rights they claimed, the various avenues of administrative and in-court processes provided by the state were found sufficient to overcome their 42 U.S.C. § 1983 claims. Although there is no question but that the basis for the determination of a public employee's property and contract rights is an important question, the Court may not want to devote its time to that issue when its resolution is not determinative of the outcome of the case.

Furthermore, the reasons given by Petitioners for granting the writ are not convincing. Their first argument in favor of granting the writ is that, unless reversed, the decision of the Eighth Circuit could be cited for the erroneous proposition that a state employee's employment contract would be determined with reference to federal, rather than state, law. We fail to see how.

The Circuit Court said:

> The District Court based its determination upon its interpretation of the Merit System Rules. It properly looked to such rules in determining the extent of the employees' property interests, since such interests are created by, and their dimensions and suffici-

ency are judged by, "state law—rules . . . that secure certain benefits and . . . support claims of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); see *Bishop v. Wood*, 426 U.S. 341 (1976). In Nebraska, such state law holds that a property interest may arise for a state public employee from the rules and regulations which have become a part of his employment contract. *Weeks v. State Board of Education*, 204 Neb. 659, 663, 284 N.W.2d 843, 846 (1979) (Petitioners' Brief, Appendix, p.7a).

The Court then proceeded to list propositions from other Nebraska cases which were of assistance in ascertaining the contents of the Petitioners' employment contracts. There was a clear and unmistakable reference to the important role of state law.

Petitioners' second argument appears to be no more than a reiteration of their first, but with greater specificity. The Petitioners objected to the Eighth Circuit's decision to ignore alleged representations by their superiors which were contrary to provisions of the Merit System Rules. Both the District and Circuit Courts considered the Merit System Rules as creating an express contract of employment. In Nebraska, there can be no implied contract where there is an express agreement between the parties relative to the same subject matter. *Roth v. Lieske*, 189 Neb. 216, 201 N.W.2d 846 (1972). Furthermore, duly adopted rules are as binding as statutes. *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979). Any contract purportedly made by the assurance given by an officer or agent of the government who is acting in a manner the law does not permit is void and unenforceable. Appeal of *Roadmix Construction Corp.*, 143 Neb. 425, 9 N.W.2d 741 (1943); *City of Plattsmouth*

v. Murphy, 74 Neb. 749, 105 N.W. 293 (1905). Each of the foregoing cases, with the exception of *Roth v. Lieske, supra,* was cited by the Eighth Circuit in explaining their decision to focus on the Merit System Rules rather than representations allegedly made by superiors when an express contract covering the same subject matter already existed. The Nebraska cases fully support the Eighth Circuit's position.

The Petitioners then argue that *Halpin v. Nebraska State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982), is the Nebraska case to rely upon and that its application would produce a different result. Their conclusions are incorrect. That case involved an action in state court for declaratory relief. The plaintiffs were state patrolmen seeking a ruling that each patrolman's lump-sum payment for unused vacation and sick leave should be included in the sum of his or her total salary during the patrolman's final three years of service. The plaintiff wanted this included because his retirement benefit was determined by applying a certain percentage to his "final average monthly salary," which was the sum of his salary over the past three years divided by 36. The action was brought because a long-term practice of including the lump-sum payment was stopped following the receipt of a recommendation from the Attorney General's Office. The Court held that the practice became part of the employment contract and could not constitutionally be impaired by changing the practice. The case is distinguishable from the present one because the statutory language in *Halpin, Id.* did not expressly include or forbid the inclusion of the lump-sum payment in the calculation.

It presents the situation discussed in footnote 2 of the Eighth Circuit's opinion, which states in part: "Such unwritten understandings, however, were viewed as supplementing explicit contractual provisions in the absence of other explicit provisions [citing to *Perry v. Sinderman*, 408 U.S. 593 (1972)]. Since the Merit System Rules expressly state terms of employment, no room is left in the instant case for implied contractual agreements." (Petitioners' Brief, Appendix, p.8a). That the Nebraska Supreme Court would agree with this distinction is found at the end of the Court's opinion in *Halpin*. Although there had been no indication that the long-term practice limited the inclusion of unused vacation and sick leave to that *earned* in the final three years of a patrolman's employment, the Supreme Court, recognizing that the practice could not violate or supplant the express statutory language, stated, "[s]ince the final average monthly salary is calculated upon the total salary paid during the final three years of service, payment received for unused vacation and sick leave accumulated during the final three years of service only should be included in the calculation." *Supra* at 903, 320 N.W.2d at 916. The patrolmen's reasonable expectations were to be honored provided that those expectations were not contrary to the express terms of the contract. In the present case, the employees' expectations could not be honored for the very reason that they were contrary to the express terms of their employment contracts.

As a part of their argument, the Petitioners claimed that the "Eighth Circuit acknowledged *Halpin* . . ., and refused to follow the state law established therein." (Peti-

tioners' Brief, p.10, citing to the Circuit Court opinion at p.19a in the Appendix to their brief). Upon examination of the context of the cited portion of the opinion, it becomes apparent that the part of *Halpin* that the Court was refusing to follow was the part of the Nebraska Supreme Court decision which held that a change in the practice of the retirement system violated the Contract Clause of the United States Constitution. The Nebraska Supreme Court in *Halpin,* as did the Federal District Court in the present case, overlooked the fact that the Constitution forbids a state to *pass a law* impairing the obligation of contracts. A simple breach of contract does not give rise to an action founded on Article 1, Section 10 (See, Appendix, App. 3). As the Circuit Court noted, there must be some legislative action before an unconstitutional impairment may be found. It does not seem necessary for this Court to grant the writ for the purpose of instructing the State Supreme Court on a federal constitutional question arising in an unrelated case.

Petitioners also assert that Nebraska law does not grant any deference to an agency's interpretation of its own rules where the rules constitute an employment contract. They cite to *Drinkwine v. Flebbe,* 219 Neb. 291, — N.W.2d — (1985), and *Halpin v. State Patrolmen's Retirement System, supra.* Drinkwine merely stands for the proposition that one state agency cannot ignore the terms of a legislatively authorized contract between state employees and another agency. Neither case makes any statement concerning the amount of deference to be given an agency's interpretation of its own rules. This Court, however, in *Board of Education v. McCluskey,* 458 U.S.

966 (1982), indicated that it was inappropriate for a Federal Court to fail to give deference to a local school board's interpretation of its own rules. *See also Bowles v. Seminole Rock and Sand Company,* 325 U.S. 410, 413-14 (1945).

Furthermore, it seems likely that if the Nebraska Supreme Court was squarely confronted with the issue it would be decided in favor of granting substantial deference to the interpretation of the administrative agency. For instance, in *Haven Home, Inc. v. Department of Public Welfare,* 216 Neb. 731, 346 N.W.2d 225 (1984), the state Court relied upon *Alabama Nursing Home Association v. Harris,* 617 F.2d 388 (5th Cir. 1980), for the proposition that, "[a] presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action." 216 Neb. at 736, 346 N.W.2d at 229. The Court further stated, "This Court may not substitute its judgment for that of the DPW [Department of Public Welfare]. . . ." 216 Neb. at 736, 346 N.W.2d at 229. It also should be noted that the language the Nebraska Supreme Court excerpted from *Alabama Nursing Home Association v. Harris, supra,* was referred to by the Fifth Circuit as being the federal law applicable to a review of challenged actions of the United States Department of Health, Education and Welfare. Therefore, federal administrative law has precedential value in Nebraska.

Next the Petitioners argue that the Eighth Circuit ignored the Commissioner of Labor's supposed authority to make the alleged representations to the Petitioners.

They are apparently claiming that the Commissioner had authority to make contracts with them that violated the Merit System Rules. Ironically, one of the cases relied upon by the Petitioners in their previous argument. *Drinkwine v. Flebbe,* 219 Neb. 291, — N.W.2d — (1985), clearly indicates that the Petitioners' position is untenable. One state agency cannot ignore the legislatively authorized actions of another agency. Furthermore, even the District Court chose to rely primarily upon the express wording of the Merit System Rules as it was unclear just what representations were made to Petitioners by their superiors. "The Merit System Rules provide the answer," the Court said. (Petitioners' Brief, Appendix, p.56a). The Lower Court Memorandum Opinion contained an extensive discussion of the confusion surrounding the alleged representations (Petitioners' Brief, Appendix, pp. 41a-43a). One of the explanations mentioned by the Court was that any assurances given to the Petitioners to the effect that they would not lose seniority rights may have been directed at their vacation and sick leave benefits—which by state law are applied across state agency lines—other than their rights in the event of an unforeseen layoff.

In addition, Petitioners have claimed that the Commissioner had the authority to make binding determinations of the Merit System Rules and that the director of the Merit System did not. In support of the former assertion, Petitioners have cited to Neb.Rev.Stat. §81-112, which gives department heads authority to prescribe regulations regarding the governance of their department. This authority was exercised by including the CETA

Division as a member agency of the Merit System, which had properly promulgated personnel rules for member agencies pursuant to the Nebraska Administrative Procedures Act, Neb.Rev.Stat. §84-901 et seq. (Reissue 1981). As indicated in §81-112 (Petitioners' Brief, Appendix, p. 94a), any regulations the department head was authorized to make must be consistent with existing law. Therefore, any attempt to make rules inconsistent with the Merit System Rules would have been beyond his authority.

The Petitioners have also relied upon sections within Neb.Rev.Stat. §§48-601 through 669 to support their argument. The sections relied upon, even if applicable to this case, would not overcome the fact that the Commissioner's authority would be limited by validly enacted statutes and regulations covering the same subject matter. One need not reach that point, however, since the aforementioned sections apply exclusively to the Department of Labor's Division of Employment which was created in conjunction with the Wagner-Peyser Act, 29 U.S.C. §49 et seq. Neb.Rev.Stat. §48-601 indicates that §§48-601 through 669 are the "Employment Security Law." (Appendix, App. 3). The portion of §48-616 referring to "An act to provide for the establishment of a national employment system," which Petitioners apparently read as referring to the Comprehensive Employment and Training Act, actually refers to the system of unemployment compensation. This is evidenced not only by the title of the Nebraska law but by the further reference in the statute that the federal legislation was approved on June 6, 1933. Obviously, the Comprehensive Employment and Training Act is of much more recent vintage.

Petitioners further claim that the Commissioner of Labor is the "[u]ltimate authority in deciding how the Merit System Rules are interpreted and applied. . . ." (Petitioners' Brief p.13, 14). In support of this assertion, Petitioners have cited two of the Merit System Rules which indicate that in appeals of dismissal, suspension, or demotion the Merit System council merely makes a recommendation to the appointing authority. The appointing authority then has the final say. (Merit System Rule 13a) (1978); (Petitioners' Brief, Appendix, p.99a). The rule says nothing which indicates interpretations of the Merit System Rules are left up to the head of a member agency. The cited provision (the other one cited was no more than a previous version of the above) is simply an acknowledgement of a provision of the Nebraska Constitution giving agency heads the authority to, "Appoint and remove all subordinate employees in their respective departments." Neb. Const., Art. IV, §1 (See, Petitioners' Brief, Appendix, p.92a).

Conversely, Petitioners state that the director of the Merit System, "Has no authority to establish terms of employment or render binding opinions on construction of the Merit System Rules," citing to Neb.Rev.Stat. §§81-894,895,896 and §81-8,100. It should be noted that the above sections were repealed in 1951. *See,* Laws 1951, Chapter 311, Section 11. Further, although the cited sections may show what certain functions of the director were at one time in the past, they certainly do not disprove that the director has additional authority. The director clearly does have the authority to render binding opinions on the construction to be given the Merit System Rules. *See,*

Merit System Rule 20(4) (a-d) and Rule 3(7) (n) (1978) (Appendix, App. 4). Also see Neb.Rev.Stat. §84-912 (Reissue 1981) (Appendix, App. 3). Insofar as the Merit System director's authority to establish terms of employment is concerned, Respondents have not argued that he has such authority. Rather, it is the properly promulgated Merit System Rules which establish such terms. It is unclear just where Petitioners are attempting to go with their argument. It almost seems that they are trying to say that the Merit System Rules are void and that it is the oral representations of their superiors—whatever those might have been years ago—which are all-important. It seems odd for Petitioners to take this tact now since a review of their complaints would disclose that they primarily rested their claim of entitlement upon the Merit System Rules.

The Eighth Circuit was correct in giving weight to the Merit System director's interpretation of the Merit System Rules and regulations. The Court did not ignore the authority of the Commissioner of Labor as claimed.

In the last part of their argument, the Petitioners claimed that the Circuit Court failed to apply the law that was in existence at the beginning of their employment with the CETA Division. They complained that the Court considered the 1978 Merit System Rules as the controlling rules. The Court, however, indicated that its interpretation of the earlier versions of the rules was consistent with the interpretation it gave to the 1978 rules. (Petitioners' Brief, Appendix, p.11a-12a). Further, the District Court had previously concluded, "that the rights of

the manner of calculation did not vest in the plaintiffs prior to the time of the layoff." (Petitioners' Brief, Appendix, p.60a). The Court had also concluded that the 1978 rules were controlling on the question of bumping rights (Petitioners' Brief, Appendix, p.61a). Neither determination was appealed by Petitioners. Therefore, the reference to the 1978 version as "controlling" would not have been erroneous or prejudicial. Perhaps even more important is the fact that the issue of whether the state may change a personnel rule such as the one involved here without running afoul of the Constitution was not raised or discussed at length in the Circuit Court. It is a question thus left to another lawsuit. Petitioners' complaints alleged that it was the July 9, 1981, RIF guideline that deprived them of their rights. They did not claim that it was the amendments to the Merit System Rules in effect at the time they were hired that deprived them of their rights It would be inappropriate to allow them to relitigate the case at this late stage.

CONCLUSION

The law in Nebraska has not been ignored by the Eighth Circuit. Instead, the Court applied that law in determining the scope and sufficiency of Petitioners' claimed property interests in their contracts of employment, as required by *Bishop v. Wood,* 426 U.S. 341 (1976) and *Board of Regents v. Roth,* 408 U.S. 564 (1972). While it is true that the Circuit Court cited the case of *Halpin v. State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982), as being contrary to its conclusion, it did so with respect to a conclusion by the Nebraska Supreme Court that a simple breach of contract equated to a

violation of the Contract Clause of Article 1, Section 10, of the Constitution. The Contract Clause, while forbidding a state from passing a law which impairs the obligation of contracts, does not reach alleged breaches which are caused by something other than legislative action. *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Company v. New Jersey,* 431 U.S. 1 (1977); *New Orleans Waterworks Company v. Louisiana Sugar Refining Company,* 125 U.S. 18 (1888). By deciding this federal constitutional question in accordance with the decisions of this Court but contrary to the Nebraska Supreme Court, the Eighth Circuit can hardly be accused of violating the precepts of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). That case stands for the proposition that, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78. The interpretation of the Commerce Clause is obviously a matter "governed by the Federal Constitution." The Circuit Court did not step outside the authority granted to it. Therefore, there are no special or important reasons for granting the Writ of Certiorari to this Court and the Respondents request that the petition for the Writ be denied.

Respectfully submitted,

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APPENDIX

May 22, 1974

Mr. Donald Bumgarner
Personnel Officer
Division of Employment
550 South 16th Street
Lincoln, Nebraska 68508

Dear Mr. Bumgarner:

In reply to your question concerning seniority rights in the Merit System.

Seniority rights apply only to the agency, or office, or department in which they are held. They are not transportable from one Merit System agency, office or department.

There is a difference, however, between seniority rights and continuous service for credit towards sick leave, annual leave and retirement. An individual who works for one agency, office or department in State Government and within a period of less than one year leaves that agency and transfers to another agency maintains their continuous service record for credit toward allowance for sick leave, annual leave or retirement. This particular section is called to your attention so that neither you nor an employee will confuse this right of credit for continuous service with seniority rights for purposes of promotion, pay raise or in the event of a reduction in force or a termination or the discontinuance of an agency or program.

To summarize, seniority rights apply only to the specific program area in which an employee works. Continuous service rights for fringe benefits apply for any State Government operation and are transportable. To repeat, seniority rights are not transportable from agency to agency.

Sincerely yours,

James T. Edington
Merit System Director

JTE/jlc

Chapter 15—Resignations and Layoffs

002 Layoffs. The agency head decides when a layoff is necessary, which classes will be affected, and if the layoff will be limited to a facility.

002.01 Agency heads shall send the Director of Personnel a copy of their layoff plan prior to the initiation of any layoff. Details concerning which classes to be affected first are not necessary. Details which should be included are on what basis bumping rights are to be exercised, and any affirmative action considerations.

002.02 Employees to be laid off shall be given a 15 workday notice prior to layoff, except that when emergency funding situations exist, this notice period can be shortened with the approval of the Director of Personnel.

002.03 Agency heads shall decide how bumping rights can be exercised. The basis for bumping shall be quality of service, length of service, any job-related factor, any affirmative action consideration, or any combination of these.

002.04 Employees occupying positions designated for layoff may bump employees with lesser retention privileges, as determined by the agency, out of:

—positions of the same class;

—lower positions within the same class series;

—classes the employee previously occupied;

—lower positions within the same class series as the employee previously occupied.

002.05 The agency head shall establish by facility or geographical areas or by total agency where bumping rights may be exercised.

002.06 Bumping rights shall not take place between agencies.

THE CONTRACT CLAUSE OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Neb.Rev.Stat. §48-601. Act, how cited. Sections 48-601 to 48-669 shall be known and may be cited as the Employment Security Law.

Source: Laws 1937, c. 108, § 1, p. 370; Laws 1941, c. 94, § 14, p. 401; C.S.Supp., 1941, § 48-701; R.S. 1943, § 48-601; Laws 1949, c. 163, § 1, p. 417; Laws 1953, c. 167, § 1, p. 520; Laws 1981, LB 470, § 1.

Neb.Rev.Stat. §84-912. Agency; applicability of rule; declaratory ruling; review of ruling. On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged unless it is altered or set aside by a court. Such a ruling is subject to review in the manner provided in sections 84-917 to 84-919, for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Source: Laws 1959, c. 456, § 5, p. 1512; Laws 1979, LB 137, § 1.

NEBRASKA MERIT SYSTEM RULES
February 16, 1978

3(7) *Duties of the Nebraska Joint Merit System Director:* The Nebraska Joint Merit System Director shall: . . . (n) Perform duties necessary or proper for making effective these Rules and all policies and procedures adopted in pursuance thereof. The power of the Director to make effective the provisions of these Rules shall not be deemed to be contingent on the adoption of policies and procedures; but, in the absence of policies that are applicable, the Director shall have power to take such action, not inconsistent with these Rules as may be reasonably necessary and proper to effectuate the purposes thereof; and . . .

20(4)(a) Any person may make a written request for a declaratory judgment as to provisions of these Rules or other written statement of law or policy, decision or order of the Council the Director or other authorized person.

20(4)(b) No special form or procedure shall be required for a declaratory judgment. The request must state specifically the Rule, written statement of law, policy, decision or order concerned and enough information must be presented in the posed question so it may be answered completely and accurately.

20(4)(c) Answers to requests for declaratory judgments will be made within fifteen (15) working days of the receipt of the request, unless the request must be answered by the Council. In the latter instance the request will be presented to the Council at their next regularly scheduled meeting and answer will be made within fifteen (15) working days following that Council meeting. If it is

necessary the request be presented to the Council, petitioner will be notified of such action.

20(4)(d) Declaratory rulings made by the Council, the Director or other authorized persons shall have the same status as a decision or order in a contested case.